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No. 03-1116

In The Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor; et al.,

Petitioners,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Respondent,

v.

ELEANOR HEALD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents' Brief in Opposition claims that Michigan's Petition is not the proper vehicle to resolve the constitutional questions presented. That claim, however, is not shared by thirty-six States which, through their Attorneys General, have filed an *amici* brief urging that certiorari be granted to resolve the split of authority and to give guidance as to how States can structure their alcohol beverage distribution systems. *See* 03-1116, Ohio and 35 Other States *Amici* Br. at 20. Respondents' opinion is also not shared by State alcohol beverage regulators who, through their associations, have urged the granting of certiorari. *See* 03-1116 and 03-1120, NABCA & NCSLA *Amici* Br. at 1-2.

In Respondents' effort to achieve denial of certiorari, they claim that the Petition before this Court merely presents an "interesting" and "novel" constitutional question. Respondents' Brief in Opposition, p. 1. Respondents describe the state of the law before this Court as "more like a 2000 Bordeaux than a 1961." *Id.* at 30. However, the interplay between the dormant Commerce Clause and the 21st Amendment is a question that has caused considerable litigation and appellate review in the country since prohibition was repealed by the 21st Amendment in 1933.[1] The Petitions present constitutional questions that have resulted in a dramatic split of authority among the six federal circuit courts that have addressed the issues (2nd, 4th, 5th, 6th, 7th and 11th).

I. Most recently (and since the filing of this Petition), the Second Circuit issued an opinion upholding New York's ban on direct shipping of wine to consumers by out-of-state distributors, declaring that the State laws are permissible exercises of the State's authority under the 21st Amendment.

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[1] *Smokey and the Bandit in Cyberspace*, Brannon P. Denning, West Law, 19 Const. Comment 297, 2002, pp. 1-2.

Swedenburg v. Kelly, 358 F.3d 223 (2nd Cir. 2004). New York's law was upheld as constitutional despite its law allowing in-state wineries the right to direct ship.

By unanimous decision from a panel of three judges of the Second Circuit, the two-step Commerce Clause and 21st Amendment analytical framework utilized by the Fourth, Fifth, Sixth and Eleventh Circuit Court of Appeals was rejected.[2] That rejected framework first calls for examining a State's ban on out-of-state direct shipment of alcoholic beverages under the dormant Commerce Clause. If the State statutory scheme is determined to facially discriminate between out-of-state and in-state wineries in violation of the dormant Commerce Clause, it is almost always *per se* invalid. *Theoretically*, it can be saved by the 21st Amendment, "but only if it advances one of the Amendment's 'core concerns.'" *Id.* at 231.

Instead, the Second Circuit applied a plain reading interpretation to the 21st Amendment recognizing that this Court has consistently held that "a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate beyond the state's borders or to preserve fundamental rights." *Id.* at 233.[3] The Second Circuit's decision is consistent with the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

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[2] *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

[3] *Swedenburg's* Petition for Certiorari to review the Second Circuit's decision is pending with this Court. *Swedenburg v. Kelly* (No. 03-1274). New York's response to that petition is that certiorari should be granted on the issue of whether New York's ban on direct shipment of alcoholic beverages by unlicensed out-of-state wineries is within the powers conferred by the 21st Amendment. 03-1274, Respondents' Brief, p. 23. New York requests that the petitions in this case and theirs be jointly granted. *Id.* at 7.

Now that six federal appellate circuits have reached differing conclusions as to the standard of deference to be given State alcohol beverage importation laws, the merits of the constitutional questions, and the remedy where importation laws are found unconstitutional, the time is ripe for a ruling by this Court.[4]

II. The issues have been framed and guidance is needed now. *See*, e.g., *Bainbridge*, 311 F.3d at 1112 referring to the interplay between the 21st Amendment and the Commerce Clause as a never-never land and opining (at 1113, n. 14) that "[t]he Supreme Court cases are confusing because many of them implicate different issues and, at the same time, borrow quotations from one another." *See* also *Heald* at App. 11a, noting that "[s]ince *Bacchus* the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's core concerns."

III. Respondents assert that because there are other pending cases at the district court level, this Court should not consider the issues now even though six circuit courts have already considered and ruled on the issues. Respondents' Brief in Opposition at p. 30. Respondents neglect to mention that either their counsel of record in this case or the counsel of record for Petitioners in *Swedenburg* are (or were) involved in five of the six cases decided by the circuit courts (the one exception being *Dickerson)* and in every one of the district

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[4] On the merits *Heald* (6th), *Dickerson* (5th), *Beskind* (4th), *supra*, use a dormant Commerce Clause analysis to strike down the out-of-state direct shipment bans, but *Bridenbaugh* (7th) and *Swedenburg* (2nd) *supra*, uphold the laws under the 21st Amendment. *Bainbridge* (11th) differs from *Heald, Dickerson*, and *Beskind* by giving greater deference to State regulation of alcoholic beverages and did not require the State to show no nondiscriminatory alternatives available. *Beskind* (struck the in-state direct shipment exemption) and *Dickerson* (struck the out-of-state direct shipment ban) differ on the remedy to be applied when a dormant Commerce Clause violation has been found.

court actions referred to at 03-1120 Pet. 15 n. 8. *See* Respondents' Brief in Opposition p. 30. Therefore, not only do this case and *Swedenburg* neatly present the split of authority, but they involve counsel who have represented almost all of the plaintiffs in the cases through which the split has developed and who have largely orchestrated the challenges to State regulation of importation of alcoholic beverages.

While Respondents are apparently willing to accept continued uncertainty and confusion as to the state of the law, that is not fair to the States or their citizens, legislatures and regulators who need certainty. *See* 03-1116 Ohio and 35 Other States *Amici* Br. at 1 ("The *amici* States all have a strong interest in the resolution of this issue, as every State regulates in some manner the direct shipment of alcohol to its residents.") and 03-1116, 03-1120 NABCA & NCSLA *Amici* Br. at 10 ("A clear mandate from this Court is needed to avoid further inconsistency and conflict.").

IV. Respondents' brief is simply wrong when it asserts that there is no split of authority and that all six Court of Appeals decisions can be reconciled. Clearly, this case is inconsistent with the decisions in *Bridenbaugh* and *Swedenburg* (on the merits), and the decisions in *Bainbridge* (as to the burden of proof) and *Beskind* (as to remedy).[5]

For example, the Indiana statutory scheme at issue in *Bridenbaugh* is for practical purposes indistinguishable from Michigan's scheme. Both Michigan and Indiana allow in-state

[5] There is clearly a circuit split on the appropriate remedy where a dormant Commerce Clause violation is found, compare *Beskind, supra* (striking the in-state exemption) with *Dickerson, supra* (striking the ban on importation). In this case, the Sixth Circuit granted "final" judgment to the respondents; therefore, this case squarely presents the issue of the appropriate remedy in light of the 21st Amendment – an issue that was raised with the Sixth Circuit by the State. *See,* e.g., State's Petition for Rehearing *En Banc,* p. 2, 5, and 14.

licensed wineries to directly ship alcoholic beverages to their state residents, but prohibit out-of-state wineries from doing so. *Bridenbaugh* clearly recognized this fact when it acknowledged that Indiana permits "local [Indiana] wineries, but not wineries in the business of selling . . . in another state or country, to ship directly to Indiana consumers." *Bridenbaugh,* 227 F.3d at 849.

Apparently Respondents would give the quoted Indiana statute a different and uncalled-for reading to say that both in-state and out-of-state wineries, which sell in other states, are barred from direct shipping to Indiana consumers. However, the Indiana statute does not say that. In fact, the attorney of record for Respondents was also counsel for the plaintiffs in *Bridenbaugh* and pointed out to the *Bridenbaugh* court that he understood that local wineries could ship to Indiana consumers, but out-of state wineries could not. *See* Plaintiffs CA 7 Br. 3, 5. In this regard the *Bridenbaugh* plaintiffs stated (CA 7 Br. at 5):

> Indiana law prohibits any person in the business of selling alcoholic beverages in another state from shipping wine directly to an Indiana resident. *The prohibition applies only to out-of-state businesses. Indiana* wholesalers, retailers and *small wineries are allowed to make such direct shipments to consumers' homes.* [emphasis added.]

There simply is no principled way to distinguish *Bridenbaugh* from this case, despite the attempts made by the Sixth Circuit and Respondents.

V. Even though there are some differences between the statutory schemes at issue here and in *Swedenburg,* there is nothing in Michigan's statutory scheme that would warrant a different constitutional result than that reached by the

Swedenburg Court.[6] A close reading of *Swedenburg* demonstrates that the case did not turn on the uniqueness of the New York statutory scheme, but rather on the inherent power delegated to the States by the 21st Amendment. The reasoning and analytical framework of that court's decision, with its recognition of the plain language of the 21st Amendment, would uphold a statutory scheme like that at issue here.[7] New York's law barring direct shipment by firms without an in-state presence "falls squarely within the ambit" of that authority. *Swedenburg*, 358 F.3d at 237. The same result should be reached in this case.

Like New York, Michigan generally requires all sales and direct shipment of beverage alcohol to be by licensed in-state regulated retailers that have a presence in the state. MCL 436.1203(1); 1113(9).[8] In a well-reasoned opinion, the *Swedenburg* panel traced the history and intent behind the 21st Amendment dating back to the pre-prohibition era. *Swedenburg, supra* at pp. 232-233. It noted the States' early struggles with regulating alcoholic liquor imported into their territories when the dormant Commerce Clause was used to strike down such regulations. The Second Circuit recognized that with passage of the Wilson and Webb-Kenyon Acts in

[6] The petitioners in *Swedenburg*, for example, assert that there is no "meaningful dissimilarity between New York's regulatory scheme and those struck down in Michigan." *See Swedenburg*, 03-1274 Pet. at 18.

[7] *See Swedenburg*, 358 F.3d at 233, where it held that the Twenty-first Amendment "should not . . . be subordinated to the dormant Commerce Clause and where the Court noted that a state's power to regulate the physical importation of alcohol is defined by the 21st amendment's "plain language." U.S. Const. amend. XXI, § 2.

[8] Respondents claim that the State did not make the argument to the Sixth Circuit that "[a]ny qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker." Respondents' Brief in Opposition, p. 4, n. 1. This, of course, is not accurate as the State did in fact make this representation and argument to the Sixth Circuit. *See* CA 6 (01-2720), State Appellee's brief, pp. 40-41; State's Petition for Rehearing *En Banc*, pp. 8-9.

1890 and 1913, Congress reacted to the States' frustration with regulating the importation of beverage alcohol when such regulations were challenged under the Commerce Clause. Those statutes intended to give States the authority to regulate "imported alcohol in the same manner as domestically produced alcohol." *Id.* at 232. Passage of the 21st Amendment repealing prohibition in 1933 did not return the Constitution to its pre-prohibition form. "Section 2 . . . constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Id.*

Citing the decision from the Seventh Circuit in *Bridenbaugh*, 227 F.3d at 853, the Second Circuit found that "*section* 2 speaks directly to the importation of liquor into the state [and] dormant Commerce Clause jurisprudence could no longer be employed to insulate interstate shipments of liquor from state regulation, as almost 'every use of § 2 could be called "discriminatory" in the sense that . . . every statute limiting [interstate] importation leaves intrastate commerce unaffected.'" *Id.* at 232-233. The *Swedenburg* Court noted: "Allowing dormant *Commerce Clause* concerns to restrict state regulatory schemes that focus on the importation of liquor would render *section* 2 a nullity." *Id.* at 233.

In summarizing early 21st Amendment case law of this Court, the Second Circuit correctly found that those cases established "that section 2 provided the states with the authority to enact legislation for the regulation of alcohol traffic within its borders, even where those regulations operated to the disadvantage of out-of-state interests." *Id.* at 234. The Second Circuit noted that some courts have distanced themselves from these early Supreme Court cases but "they have never been overruled." *Id.* at 234. It is recognized in the *Swedenburg* decision that section 2 gives "States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.*

at 233. The Court declared "the drafters of the *Twenty-first Amendment* crafted *section 2* to allow states the authority to circumvent dormant *Commerce Clause* protections, provided that they were regulating the intrastate flow of alcohol." *Id.* at 237.

Accordingly, the Second Circuit upheld the New York law as constitutional under the powers granted to it by the 21st Amendment to regulate the importation and distribution of beverage alcohol. *Id.* at 239. It found that the New York scheme operated in a non-discriminatory manner because it targeted valid state interests in controlling the importation and transportation of alcohol. *Id.*

VI. Respondents also claim that the Sixth Circuit decision "held only that the Michigan *regulatory* scheme, as construed and applied by the Michigan Liquor Control Commission, was facially, or plainly, *discriminatory-not* that plaintiffs were bringing only a facial challenge." Respondents' Brief in Opposition, p. 28, n. 16. However, there is no question that the Sixth Circuit found Michigan's statutory provisions unconstitutional on their face without according proper deference to them (the Court did not apply the "no set of circumstances test") and that such a finding was dispositive. *Heald,* 342 F.3d at 524-525. App. 13a-14a.[9] *See Coleman v. Dewitt,* 282 F.3d 908, 914 (6th Cir. 2002), *cert. denied* 536 U.S. 914 (2002).

[9] The Sixth Circuit stated in pertinent part:

> In reviewing challenges brought under the Commerce Clause, the Supreme Court has long held that statutes that facially discriminate are "virtually per se invalid." *Id.* at p. 524. Apx. 13a.
>
> Having determined that *the provision is facially discriminatory* [Apparently referring to MCL 436.1113(9)], we now turn to the question of whether the regulatory scheme is nevertheless constitutional. . . . *Id.* at p. 525. Apx. 6a, 15a. (emphasis added).

VII. Finally, Respondents rely upon a Federal Trade Commission (FTC) report from staff of that agency for the proposition that Michigan should allow out-of-state direct shipments because other States that have done so report "few or no problems with shipments to minors or with tax collection." Respondents' Brief in Opposition, p. 19. This report, however, is of very questionable credibility. *FTC Report* at 2.

The FTC Report itself does not directly support Respondents' arguments with any type of independent research or findings. The report "does not focus on the merits of the tax debate. . . ." *See* http://www.ftc.gov/opa/2003/07/wine.htm. The report relies on a self-serving statement by the Wine Institute (a trade association of pro-direct shipment interests) that its members will comply with the law and pay taxes. *FTC Report* at 39-40.

A new National Academy of Sciences (NAS) study discredits the report in noting that the problem of Internet alcohol purchases is so serious that an argument can be made that banning Internet and home delivery sales altogether is warranted in light of the likelihood that these methods will be used by underage purchasers. *Reducing Underage Drinking, A Collective Responsibility,* Bonnie R. & O'Connel, M. (eds) at 174 (2003).[10] The NAS report found that underage alcohol use costs the nation an estimated $53 billion annually, including $19 billion from traffic crashes and $29 billion from violent crime. *Id.* at 1. "Limiting youth access to alcohol has been shown to be effective in reducing and preventing underage drinking and drinking-related problems." *Id.* at 6. "Many Internet sites sponsored by alcohol companies are easy for

[10] Read on line http://www.nap.edu/books/0309089352/html/.

children to access" and do not require age verification. *Id.* at 142.[11]

CONCLUSION

The reasons for granting certiorari in this case to resolve the substantial split of federal authority over the interplay between the 21st Amendment and the dormant Commerce Clause have crystallized with the issuance of the *Swedenburg* decision. This Court should reject Respondents' attempt to downplay the obvious split of authority. The questions presented are of obvious nationwide importance. There is clear and immediate need for guidance from this Court. Certiorari should be granted.

Respectfully submitted,

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[11] Michigan presented evidence on the record of prosecutions for illegal out-of-state direct shipments to minors; surveys showing the problem with underage drinking at State colleges and the widespread use of the Internet for ordering alcohol; studies submitted by the *Amicus* Michigan Interfaith Council on Alcohol Problems and the *Amicus* State Universities demonstrating the widespread marketing of alcohol to minors. (CA 6, 01-2720, Apx., Vol. 2, pp. 448-473).